Office Supreme
AUG 19
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 170

SAMUEL MOSLEY,

Petitioner,

against

CIA. MAR ADRA, S.A.,

and

LIPSETT STEEL PRODUCTS, INC.,

Respondents.

SUPPLEMENTAL ANSWER AND REBUTTAL OF LIPSETT STEEL PRODUCTS, INC. TO SUPPLEMENTAL AND REPLY BRIEF OF PETITIONER, SAMUEL MOSLEY

EDMUND F. LAMB,
Attorney for Respondent,
Lipsett Steel Products, Inc.,
80 Broad Street,
New York 4, N. Y.

and

VINCENT A. CATOGGIO,
of Counsel

INDEX

Cases cited:

	PAGE
Atlantic Coast R. Co. v. Kammerer, 205 F. (2d) 525	3
Basso v. Palmer, 138 F. (2d) 914 at 915	3
Ferguson v. Moore-McCormack Lines, 352 U. S. 521 at 523	3
Isthmian Lines, Inc. v. Street, 313 F. (2d) 35	3
N.L.R.B. v. Red Spot Electric Co., 191 F. (2d) 697	3
Palmer v. Hoffman, 318 U. S. 109	3
Quercia v. United States, 289 U. S. 464 at 470	4

IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 170

SAMUEL MOSLEY,

Petitioner,

against

CIA. MAR. ADRA., S.A.,

and

LIPSETT STEEL PRODUCTS, INC.,

Respondents.

SUPPLEMENTAL ANSWER AND REBUTTAL OF LIPSETT STEEL PRODUCTS, INC. TO SUPPLEMENTAL AND REPLY BRIEF OF PETITIONER, SAMUEL MOSLEY

Petitioner, Samuel Mosley, has supplemented his 19-page Petition with a Supplemental and Reply Brief which raises entirely new and different questions from those presented in the Petition and it does not serve as a reply to the Respondents' answer herein. Petitioner, Samuel Mosley, thereby has violated Rule 23, Subdivisions 3 and 4 of the Rules of this Court. Rule 23(3) provides:

"3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the

petition, as provided in subparagraph (h) of paragraph 1 of this rule. No separate brief in support of a petition for writ of certiorari will be received, and the clerk will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief."

Rule 23(4) provides:

"4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

Under the foregoing circumstances and pursuant to Rule 25(4) of this Court, leave respectfully is requested to submit this Supplemental Brief.

Petitioner, Mosley, misunderstands the meaning of Rule of Civil Practice, 51 (Supplemental Brief, p. 7), and misunderstands the decisions in *Palmer* v. *Hoffman* (Supplemental Brief, p. 8), 318 U. S. 109; *Basso* v. *Palmer* (Supplemental Brief, p. 12), 138 F (2d) 914; and *Isthmian Lines, Inc.* v. *Street* (Supplemental Brief, p. 14), 313 F (2d) 35, and attempts to weave them into a falacious argument in support of his erroneous contentions.

F.R.C.P. 51 deals with and relates only to errors of law in a Judge's charge. The Advisory Committee on Rules in a note to Rule 51 indicated that this Rule was to take the place of Supreme Court Rule 8, which long provided that exceptions to the charge of the Court should "state distinctly the several matters *of law* in such charge to which he excepts." The Court of Appeals herein has not granted a new trial on the ground that there was an error *of law* in the charge, but rather on the ground that there was no evidence to support a verdict for the plaintiff based on unseaworthiness of the hook which Petitioner used.

Palmer v. *Hoffman*, 318 U. S. 109, involved an error of law in the Judge's charge to which attention had not specifically been directed. It did not involve submission of any issue as to which there was no proof.

Basso v. *Palmer*, 138 F (2d) 914, does not stand for what Petitioner suggests. The Court said at page 915:

> "The testimony was such as justified the jury in finding that while walking along the platform he was struck by a through train passing on a local track without sounding any bell or whistle at a speed of 50 miles or more. Whether he was struck by the overhang of the car or engine (the track being at that point curved) or whether he was sucked in was left in doubt."

Thus, there is a clear holding that the gravamen of the offense definitely had been established. Whatever else is said in that opinion is *obiter dictum*. Shepardizing of that 1943 decision reveals that it never once has been cited or relied on in any Federal Court.

In No. 1158, *Isthmian Lines, Inc.* v. *Street*, 313 F (2d) 35, a seaman was involved. The Court of Appeals was called on to decide whether the proof established unseaworthiness. The Court applied the rule of *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521 at 523, in that he "had been furnished no safe tool to perform his task" and affirmed the judgment for the plaintiff. A steamship owner is required to furnish tools to a seaman, but in the instant case the steamship owner was not required to, and there is no proof that the steamship owner did furnish any tools to the longshoreman, Mosley, the Petitioner.

Appellate Courts are under a duty to note clear error which works an injustice, irrespective of whether attention has been directed to the error at the trial or not, 28 U.S.C. 2106; *Atlantic Coast R. Co.* v. *Kammerer*, 205 F (2d) 525; *N.L.R.B.* v. *Red Spot Electric Co.*, 191 F (2d) 697.

As this Court said in *Quercia* v. *United States*, 289 U. S. 464 at 470:

> "The court may not charge the jury upon a supposed or conjectural state of facts of which no evidence has been offered."

At the trial of the instant case the Respondents clearly stated that there was "a total lack of proof of any unseaworthiness. There is nothing to be submitted to a jury." (R. 25a). As a matter of simple logic, the greater includes the lesser. When the Court submitted the issue as to whether unseaworthiness existed because of the hook which Petitioner used, it did so in face of the express contention that neither as to lighting or as to the hook was there anything to submit to the jury.

CONCLUSION

The Petition of Samuel Mosley, plaintiff below, for certiorari, in all respects should be denied.

Dated: New York, N. Y., August 16th, 1963.

Respectfully submitted,

EDMUND F. LAMB,
Attorney for Respondent,
Lipsett Steel Products, Inc.

VINCENT A. CATOGGIO,
of Counsel.